

2010 WL 2806227 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

DIGNITY CARE, INC., Plaintiff/Appellee,
v.
Maxine MONTGOMERY-RYAN and Max Montgomery, Defendants,
and
Kenneth Ryan, Defendant/Appellant.

No. 10-103656-A.
June 23, 2010.

Appeal from the District court of Saline County, Kansas, 28th Judicial District, Division
4, The Honorable Patrick H. Thompson, Judge, District Court Case No. 08 LM 1779

Brief of Defendant/Appellant Kenneth Ryan

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*1 I. Nature of the Case

Plaintiff nursing home sued three defendants for an unpaid \$5,909 bill incurred by an **elderly** woman during her stay in its facility. The appeal is from the trial court's finding that the Kansas doctrine of necessities applies to this fact pattern.

II. Issues To Be Decided on Appeal

A. Is a husband liable for a wife's necessities under the Kansas doctrine of necessities when the wife has financial resources to pay for them? In the facts of this case she (a) has a positive net worth approximating \$350,000, (b) has annual income of over \$60,000, and (c) lives with her self-employed adult son.

B. Is a husband liable for a wife's necessities under the Kansas doctrine of necessities when the wife has appointed an independent agent under a durable power of attorney who chose to incur expenses for the wife but did not then pay them from the wife's adequate financial resources? In the facts of this case the wife (a) has a positive net worth approximating \$350,000, (b) has annual income of over \$60,000, (c) lives with her agent, who is also self-employed, and (d) appears to no longer be competent to make her own decisions.

C. Does the Kansas doctrine of necessities override Kansas trust law and a written trust instrument under which trustees are empowered to make decisions in their sole and absolute discretion for the benefit of the beneficiary when the husband is the beneficiary (but not a trustee) and the wife has adequate financial resources to pay for her necessities? In this case the wife

has a positive net worth approximating \$350,000 and annual income of over \$60,000, and the plaintiff was not a direct creditor of the husband.

***2** D. Is a husband liable for a wife's necessities under the Kansas doctrine of necessities after they wed in middle age over twenty years ago, agreed then in writing to separate all their financial affairs and land ownership, have since adhered to their agreement, had successful independent careers, and today have independent investments and individually owned substantial financial resources?

III. Statement of Facts

A. The Defendants: Maxine Montgomery Ryan, Max Montgomery and Kenneth Ryan

Defendant Kenneth Ryan (Kenneth) and Defendant Maxine Montgomery-Ryan (Maxine) married late in life and are still married. (R. Vol. I, p. 112) *NOTE: The PTO at R. Vol. I, p. 112 erroneously but harmlessly, for purposes of this appeal, also states that they "went through a second marriage ceremony in 2007."*

In 1987 they signed an agreement that each would be responsible for his or her own financial affairs, a contract to which they adhered during their lives together. (R. Vol. I, pp. 43-49)

They created separate revocable trusts. (R. Vol. I, p. 50; R. Vol. III, pp.45-46)

Kenneth did not appear personally at the trial but was excused; he was represented by counsel (R. Vol. I, p. 128) and the court acknowledged Kenneth's doctor's advice that he not testify (R. Vol. I, p. 29)

Maxine did not appear at the trial in person or by counsel (R. Vol. I, p. 128) and was also in frail health. (R. Vol.III, p. 14)

***3** Kenneth's children by his prior marriage are sole trustees of his trust. (R. Vol. I, p. 50) They are empowered under the trust instrument and Kansas law to make decisions in their sole and absolute discretion for his benefit (R. Vol. I, p. 52-55)

Maxine is the nominal trustee of her trust. (R. Vol. III, pp. 45-46). However, when her trust sold land in 2008, another person was court-appointed as trustee to sign the Trustee Deed. (R. Vol. III, pp. 46-47) Her trust owns land in Kansas, Colorado and Florida. (R. Vol. III, p. 23)

Maxine lives with her son, defendant Max Montgomery (Max), (R. Vol. I, p. 129) in a house Maxine owns and into which she was moved by Max after her stroke. (R. Vol. III, pp. 14 and 54) She was living there until she was admitted to plaintiff's facility. (R. Vol. I, p. 27-28)

On April 4, 2007 Max became Maxine's agent under a durable power of attorney for both health care matters and financial affairs. (R. Vol. II, pp. 1-15)

Max is employed at a corporation he owns. (R. Vol. III, p. 13)

On November 23, 2009, the attorney representing both Maxine and Max was permitted to withdraw from further representation (R. Vol. I, p. 126) after filing a motion to do so on November 16, 2009. (R. Vol. I p. 124) Trial took place on December 3, 2009. (R. Vol. III, p.1)

B. The Cause of Action

While Kansas Department of Social and Rehabilitation Services investigated an allegation of **elder abuse** against Maxine (R. Vol. I, p. 129) Max elected to place her in plaintiff's facility on April 18, 2007. (R. Vol. I, p. 129-130) The unpaid principal amount of the invoice for her care is \$5,909.00. (R. Vol. I, p. 130)

***4 C. Marine's Assets**

Kansas county appraisers place a \$563,650 value (by calculation, R. Vol. III, pp. 61 - 65 as supported also by R. Vol. II, pp. 87-92: $\$38,010 + \$162,300 + \$141,700 + \$126,580 + \$95,060 = \$563,650$) on Maxine's trust's Kansas properties consisting of four houses and agricultural crop and pasture land. All are mortgaged to Thunder Bank in Sylvan Grove, KS to secure a loan which has a current balance due of \$223,246. (R. Vol. III, p. 62; R. Vol. II, pp. 77-86) Thunder Bank considered its loan to be well secured with this land, and did not need to also place mortgages on Maxine's out of state property. (R. Vol. III, p. 69)

Maxine owns unmortgaged land in Florida and Colorado. (R. Vol. I, p. 132; R. Vol. III, pp. 26, 66-67, 73-74)

Neither Maxine personally nor Max, as her agent, had paid the prior year's real estate property taxes in Kansas at the time of trial. (R. Vol. III, pp. 25-26) No evidence was introduced that property tax arrearages existed prior to Max assuming agency responsibility under the durable power of attorney. (R. Vol. II, pp. 1-15)

By calculation, Maxine's net equity in Kansas rental houses and agricultural real estate is approximately \$340,404 ($\$563,650 - \$223,246 = \$340,404$) plus the value of her Florida and Colorado investment properties.

This calculation excludes a one-third interest in a parcel of real estate owned by Maxine's trust when she was staying at Dignity Care. This one-third interest was deeded from Maxine's trust to Maxine's sister's estate to liquidate a claimed \$60,000 debt to her sister on November 7, 2008, five months after Maxine's stay at Dignity Care. No cash changed hands. (R. Vol. III, pp. 47-49; R. Vol. II, pp. 75-76)

***5 D. Murine's Income**

The trial court found that Marine's ordinary and regular gross monthly income from pensions, Social Security and Saline County rental property came to \$2,649. (R. Vol. I, p. 131). Max's original testimony was that her regular monthly income of \$2,649 (by calculation, $12 \times \$2,649 = \$31,788$ per year) came by direct deposit into her account and that in addition to these monthly payments she received irregular income from the rental property in Saline County (\$530/month) and other rentals in Ottawa County, farm income, pasture cash rent and farm subsidies. (R. Vol. III, pp. 52-55) Max later provided ambiguous testimony ("un-huh" "Okay") about whether the Saline County rental income was part of the \$2,649. (R. Vol. III, pp. 57-58)

Maxine's additional annual income, beyond the \$31,788, is calculated as follows:

Non-farm Income: Maxine owns four rental houses, and Max has lived in one for at least three years without paying rent to Maxine's trust; mere was no testimony about the fair rental value of this house. (R. Vol. III, pp. 14, 54) The potential monthly rental income from the other two Ottawa County houses at the time of trial was \$600 and \$700 respectively (R. Vol. III, p. 54) and if the Saline County rental is included at \$530 the total rental is \$1,830 per month (by calculation, $12 \times \$1,830 = \$21,960$ per year). By calculation from the above, her total 2009 non-farm income was \$53,748 (\$31,788 plus \$21,960).

Agricultural Income:

(1) Crop Income: Maxine, through her trust, owns income-producing farm ground. (R. Vol. III, pp. 52-56) Maxine receives half the crops from an 80-acre field, and in the past two years there have been two wheat harvests, a milo harvest and a *6 soybean harvest from that field. (R. Vol. III, p. 56 and p. 75) Maxine received crop-income in an unknown amount; the farm operator's testimony was that Maxine's gross crop income at time of sale was unknown to him, although he took her share of

the crops to the elevator, (R. Vol. III, p. 76-77) and Max testified that Maxine had crop income of an unknown amount, which he opined was less than expenses. (R. Vol. III, p. 55)

(2) Pasture: Maxine's trust owns the west half of a section of pasture land (a section of land is nominally 640 acres, so this is approximately 320 acres) in Lincoln County. (R. Vol. II, pp. 77, 88-89) Max testified that Maxine receives pasture rent at \$20.00/acre totaling about \$3,000 to \$4,000 per year. (R. Vol. III, p. 55) By calculation, the gross pasture rent for a half-section of pasture is \$20.00/acre times 320 acres, or \$6,400.00.

(3) USDA Program payments: Maxine receives farm subsidies of about \$3,000/year. (R. Vol. III, p. 53)

(4) Total Agricultural Income: By calculation from the above, Maxine's annual income from farm subsidies and pasture rent is about \$6,400 plus \$3,000, or about \$9,400, *plus* half the harvested crops from the 80-acre field.

In conclusion, Maxine's total 2009 income is \$53,748 (non-farm) plus \$9,400 (farm) = \$63,148 *plus* income from regular crop harvests.

E. Maxine's Expenses

Maxine has lived with Max for over three years in a house she owns (R. Vol. III, p. 14) but for which Max pays no rent. (R. Vol. III, p. 54) Max is employed at a corporation he owns. (R. Vol. III, p. 13) Maxine has no car; Max provides her transportation. (R. Vol. III, p. 25)

**7* Maxine's unpaid past-due bills generally began to accumulate after Maxine began to live with Max and he assumed the role of her agent under the durable power of attorney. (R. Vol. II, pp. 47-74 and R. Vol. II, pp. 1-15)

Maxine's set monthly expense for payments on the mortgage loan is about \$1,685 (by calculation, $12 \times \$1,685 = \$20,220$ per year). (R. Vol. II, pp. 21-23) Max testified that neither she nor he, as her agent, spends any part of her annual income to pay down the invoices incurred since 2007 (R. Vol. II, pp. 47-74) except to Salina Family Health Center (R. Vol. III, pp. 35, 44-45)

Maxine's 2009 income, net of Thunder Bank loan payments, is by calculation therefore \$43,180 (\$63,148 less \$20,220) plus the net receipts of her harvested crops.

F. Judgment and Appeal

The Court awarded plaintiff judgment jointly and severally against Maxine (who received the services), Max (who signed as responsible party) and Kenneth (under the Kansas doctrine of necessities). (R. Vol. I, p. 134) Kenneth appeals the judgment against him, which was based solely on application of the Kansas doctrine of necessities.

IV. Argument and Authorities

A. Kenneth should not be required to pay for Maxine's necessities under the Kansas common law doctrine of necessities when (he trial court found that Maxine (a) has equity, net of a mortgage securing a loan, in Kansas rental houses and agricultural real estate of approximately \$340,404, *plus* the value of her Florida and Colorado investment properties; (b) has annual income, net of her payments of the mortgage loan, of \$43,180 *plus* the gross receipts of her harvested crops and (c) **8* lives with her self-employed adult son, who is also her agent under a durable power of attorney, and shares living expenses with him.

1. The Standard of Review

The application, interpretation, and construction of a common law doctrine to a set of facts in the light of decided case precedent, reason and policy is a question of law. This Court must review the district court's findings for substantial or uncontroverted competent evidence, review the case law which has interpreted the common law doctrine, apply a de novo standard of review of the judgment of the district court as applied to the facts there shown, and reach an independent judgment. See, for instance, *Dillon Real Estate Co. v. City of Topeka*, 284 Kan. 662, 163 P.3d 298 (2007); *Veatch v. Beck*, 252 Kan. 1081, 850 P.2d 923 (1993); *State v. Fisher*, 283 Kan. 272, 154 P.3d 455 (2007); *Duarte v. Debruce Grain, Inc.*, 276 Kan. 598, 78 P.3d 428 (2003). “The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made.” *In re Tax Appeal of Panhandle Eastern Pipe Line Co.*, 272 Kan. 1211, 1225; 39 P.3d 21, 29 (2002). Cf. *In re Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

2. Authority

Appellant finds three reported Kansas cases examining the common law doctrine of necessities, although within each are references to cases decided in other states.

a. *Maurice Hartmann v. J. H. Tegart*, 12 Kan. 177 (1873)

The Court states at 12 Kan. 180 that

“... where she has separated from him the entire burden of proof rests upon the party furnishing the supposed necessities. In such a case the party furnishing the necessities, and who wishes to make the husband liable therefor, must show, first, that he furnished the necessities; second, that they were necessities; third, that her husband failed or refused to furnish them, or to furnish means whereby she could procure them, and that she had no sufficient means of her own whereby *9 to procure them; fourth, that the separation was for a justifiable cause on her part ...” (emphasis by appellant)

b. *St. Francis Regional Medical Center, Inc., Appellee. v. Edward D. Bowles, Defendant, and Tamara Bowles, Appellant*, 251 Kan. 334, 836 P.2d 1123 (1992)

In the last three sentences of this case, just before affirming the decision of the Kansas Court of Appeals, the Court states:

“However, before a creditor may seek payment from a spouse the creditor must first pursue collection from the person who received the necessary goods or services. Only if the spouse who received the benefits has insufficient resources to satisfy the debt may the other spouse be liable. Such liability is not automatic; the second spouse may raise any defenses available.” (emphasis by appellant)

c. *Bethany Medical Center, Appellee. v. Samir Niyazi, Appellant*, 20 Kan. App. 2d 464; 890 P.2d 349 (1995)

The *Bethany* Court found evidence supporting the trial court's decision that the wife did not have enough resources to satisfy the debt (890 P.2d 3S2-3S3):

“Joyce did not have medical insurance to cover her treatment at Bethany. The hospital tried to obtain a medical card for Joyce, but she did not qualify for the benefits. Joyce indicated on her admission forms that her occupation was ‘housewife.’ She indicated on the financial forms that Niyazi was responsible for the bill, although there is no evidence Niyazi himself signed the forms. On one financial form, Joyce checked a box which stated: ‘I am unable to pay this account and request consideration for assistance from Medicaid, Wyandotte County hospital fund, or other available financial resources.’ Further, there is no evidence in the record that Joyce worked outside the home before or after her divorce from Niyazi.

“Niyazi points to Dickerson's testimony that Joyce told General Collection that she would arrange to make \$ 100 payments on the debt to Bethany as proof that Joyce was able to pay the debt. Niyazi fails to mention that Joyce also told General Collection that she and Niyazi had reconciled, she was unemployed, and Niyazi was working three jobs.

“There is substantial competent evidence that Joyce did not have the resources to pay the debt to Bethany.” (emphasis by appellant)

***10** In addition, [K.S.A. 60-409\(a\)](#) allows a court to take judicial notice of the common law, constitutions, and public statutes in force, and such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute. The purpose of allowing judicial notice is to save time by eliminating the necessity of formal proof of undisputed facts.

[K.S.A. 60-412\(c\)](#) provides that an appellate court may take judicial notice of any matter specified in [K.S.A. 60-409](#), even if the court below did not. *State v. Wolfe*, 194 Kan. 697, 698, 401 P.2d 917 (1965) [K.S.A. 60-409\(a\)](#) allows a court to take judicial notice of “the common law, constitutions and public statutes in force..., and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.” (emphasis by appellant) The purpose of allowing judicial notice is to save time by eliminating the necessity of formal proof of undisputed facts. *Van Welden v. Ramsay's Inc.*, 199 Kan. 417, 423, 430 P.2d 298 (1967)

3. Argument

Under Kansas case law an essential part of the doctrine of necessities is to determine the ability of the benefitted spouse - the spouse who received the necessities - to pay a bill. The cases offer no formula, much less a bright line, to determine whether the benefitted spouse's resources (in absolute dollars or as a percentage of the indebtedness for the necessities to the benefitted spouse's total resources) support or fail to support an assertion by a creditor that the benefitted spouse has insufficient resources to pay for the necessities.

***11** In the absence of a judicially defined formula or bright line to apply to determine whether Maxine's resources are adequate to pay for necessities, the Court should apply a practical, common sense test. It has the authority to do so under [K.S.A. 60-412\(c\)](#).

After a lifetime of independent employment and investments, Maxine had (and has) a high net worth with diversified real estate holdings. She has a steady income from multiple sources. These include non-farm from pensions and rental property, agricultural subsidies, and both crop and pasture income.

Maxine's living expenses are or should be modest for two reasons: first, because she shares them with her self-employed adult son; second, because her needs and wants appear to be very simple; and third, because she lives (with her son) in a house she owns, not in a care-giving institutional facility.

Her son is also her agent under a durable power of attorney for financial matters, and is or should be able to manage Maxine's substantial income and net worth. However, her (or their) unpaid bills appear to have accumulated largely since Max assumed responsibility under the durable power of attorney.

Her mortgage loan payment is under one-third of her annual gross income. Her net annual income, after payments to Thunder Bank for her mortgage loan, was over \$40,000. This was and is her only mortgage loan. She had no mortgages on her investment real estate in Florida and Colorado.

Maxine's Kansas real estate is worth about two and a half times more than the mortgage loan secured by that real estate, even using county appraiser values rather than the currently rapidly climbing market values for agricultural real estate. The bank *12 considered itself to be well secured without adding the out of state properties to its listed collateral.

An invoice of \$5,909 represented less than 15% of her annual income after the mortgage loan payment was made (less than 10% of her gross income), even without considering her income from crop sales.

An invoice of \$5,909 represented about 1% of the gross value of her Kansas properties, or less than 1.8% of the net value of these properties after taking into consideration the balance of the mortgage loan, even without considering the value of her Florida and Colorado investment properties.

Using these as evaluation factors, Max has and had adequate, even ample, resources with which to pay or to make payment arrangements for an invoice of under \$5,909 when Maxine left plaintiff's facility.

B. Kenneth should not be required to pay for Marine's necessities under the common law doctrine of necessities when an intervening person was responsible for them: (1) Maxine appointed Max to be her agent under a Kansas durable power of attorney; (2) Max is self-employed, lives with and shares living expenses with Maxine; and (3) Max, as agent, did not pay expenses claimed to be Maxine's even through prior to that time Maxine appears to have been current on her bill. Max as agent has access to Maxine's (a) assets with a net value over \$340,000 in Kansas real estate plus the value of unencumbered out-of-state investment real estate and (b) annual income, net of the Thunder Bank mortgage loan payments, of \$43,180 plus the gross receipts of her harvested crops.

***13 1. The Standard of Review**

Kenneth incorporates by reference the argument and authority in section IV-A-1, above: that the application, interpretation, and construction of a common law doctrine in the light of case precedent, reason and policy, as applied to a set of facts, is a question of law. This Court must apply a de novo standard of review of the judgment of the district court.

2. Authority

Kenneth incorporates herein by reference section IV-A-2 above.

3. Argument

Control of Maxine's life, property and income is, because of her apparent disability, solely in the hands of Max. Max lives with her and is her agent under a durable power of attorney. Max incurred and then left unpaid her bills for "necessaries."

The distinction here from the argument in section IV-A-3, above, is that Max is an intervening agent / person. It does not appear that Maxine is capable to make decisions for herself. Max had and has access to the resources required to pay the plaintiff's relatively modest invoice for services provided to Maxine. He alone made the decision as to Maxine's admission to Dignity Care Home; neither he nor any party has suggested in the record that Maxine had any influence whatsoever in that decision.

In the absence of a judicially defined formula or bright line to apply to determine whether Maxine's resources are adequate to pay for necessities, the Court should apply a practical, common sense test. It has the authority to do so under [K.S.A. 60-412\(c\)](#). Maxine's financial resources were ample to pay an invoice of under \$6,000 incurred solely by the decision of her agent, who had full access to those resources.

***14** Although he acts for and on behalf of Maxine, during her lifetime Max is not Kenneth's spouse. The Kansas doctrine of necessities should not be misused to shield Max from decisions he freely made for his mother.

C. Kenneth should not be required to pay for Maxine's necessities under the common law doctrine of necessities when that denies and frustrates the decision-making authority of the trustees of a revocable trust, empowered under the trust instrument and Kansas law to make decisions in their sole and absolute discretion for the benefit of the beneficiary, when the unpaid necessities were incurred without Kenneth's signature, guarantee, consent or knowledge.

1. The Standard of Review

Appellant incorporates by reference the argument and authority in section IV-A-1, above: that the application, interpretation, and construction of a common law doctrine in the light of case precedent, reason and policy, as applied to a set of facts, is a question of law. This Court must apply a de novo standard of review of the judgment of the district court.

2. Authority: Excerpts from the Kansas Law of Trusts

[K.S.A. 58a-802](#): Duty of loyalty.

(a) A trustee shall administer the trust consistent with the terms of the trust and solely in the interests of the beneficiaries.

[K.S.A. 58a-809](#): Control and protection of trust property.

A trustee shall take reasonable steps to take control of and protect the trust property.

[K.S.A. 58a-811](#): Enforcement and defense of claims.

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

***15** [K.S.A. 58a-814](#): Discretionary powers.

Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

[K.S.A. 58a-816](#): Specific powers of trustee. Without limiting the authority conferred by [K.S.A. 58a-815](#), and amendments thereto, a trustee may:

(1) Collect trust property ...

(14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust; ...

(21) pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

(A) Paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;

(B) Paying it to the beneficiary's custodian, attorney-in-fact, custodial trustee or other person with legal authority to receive such funds for the benefit of the beneficiary;

(C) if the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

(D) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution; ...

(24) Prosecute or defend an action, claim or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

[K.S.A. 58a-502](#): Spendthrift provision.

(a) A spendthrift provision is valid.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

***16** (c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

(d) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion even if: (1) The discretion is expressed in the form of a standard for distribution; or (2) the trustee has **abused** the discretion.

(e) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an **abuse** of discretion or failure to comply with a standard for distribution.

[K.S.A. 58a-505](#). Creditor's claim against settlor.

(a) Except as provided by [K.S.A. 33-101 et seq.](#) and [33-201 et seq.](#), and amendments thereto, whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors....

3. Argument

Property of his revocable trust is subject to claims of Kenneth's creditors during his lifetime. However, Dignity Care is not Kenneth's creditor except by the tortured (based in the facts of this case) argument that the doctrine of necessities applies. He neither received services nor guaranteed payment as the responsible party, nor were he and Maxine living together at the time she entered Dignity Care, nor was he involved in the decision to admit her to Dignity Care. In addition, incorporating the above arguments showing Maxine had adequate resources to pay the Dignity Care invoice, the doctrine of necessities should not apply at all - and therefore Dignity Care is not Kenneth's creditor.

It is a perversion of the doctrine of necessities to assert that an indirect claim against Kenneth's trust should or can be sustained in the face of the plethora of assets ***17** owned and income received by Maxine and her trust. The trustees have a legal obligation to care for the health and welfare of Kenneth. Trust law is replete with instructions that the trustees cannot be compelled to make payments against their judgment as to their duties to the beneficiary. Codified trust law should take precedent over an

indirect claim based on an assertion of a common law doctrine, and the trustees should not be forced to abandon their duties on the facts of this case.

Absent a judicially defined formula or bright line to apply to determine whether Maxine's resources are adequate to pay for necessities, the Court should apply a practical, common sense test. It has the authority to do so under [K.S.A. 60-412\(c\)](#). The test shows that Maxine has adequate resources, and that therefore Dignity Care is not a creditor of Kenneth, and that therefore Kenneth's trust's trustees have an obligation to protect trust assets for the benefit of Kenneth.

D. Kenneth should not be required to pay for Maxine's necessities under the common law doctrine of necessities when there is in place a longstanding spousal agreement in which middle-aged, newly wedded, fully competent spouses with independent careers and investments agreed to separate all their matters of financial management and land ownership and thereafter did so, and Maxine accumulated significant personal assets and has significant personal annual income.

1. The Standard of Review

Appellant incorporates by reference the argument and authority in section IV-A-1, above: that the application, interpretation, and construction of a common law doctrine in the light of case precedent, reason and policy, as applied to a set of facts, is a question of ***18** law. This Court must apply a de novo standard of review of the judgment of the district court.

2. Authority

Kenneth incorporates by reference the authority shown in section IV-A-2 above.

3. Argument

The District Court incorrectly found that Maxine was unable to make payments on numerous bills when the evidence was (a) that only since her stroke and Max's assumption of responsibility had she fallen into arrears on them, (b) there was no evidence that her bills had increased significantly or that her income had decreased significantly since her stroke and the assumption by Max of responsibility, and (c) there was no evidence presented by Max as to how her net annual income (after payment of the mortgage loan) of over \$43,000, plus her income from crop sales, benefited her.

In the absence of a judicially defined formula or bright line to apply to determine whether Maxine's resources are adequate to pay for necessities, the Court should apply a practical, common sense evaluation. That evaluation should be that Maxine's resources are too great to be ignored. The Court has the authority to do so under [K.S.A. 60-412\(c\)](#).

V. Conclusion

Maxine has - and had - financial resources to pay the Dignity Care invoice. She appears totally incapacitated, but her son, with whom she lives in a house she owns, has financial authority under a durable power of attorney to pay that bill from her resources. The doctrine of necessities was never designed to apply in this situation. It is a doctrine of equity, developed to create constructive liability when a married couple consists of one ***19** person with resources and the other without, such that the "without" spouse must totally rely financially on the "with" spouse. That is *not* this case.